Date of acceptance : 07/10/2020

ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

REPORT FOR THE HEARING *

(Access to the documents of the institutions – Harmonised standards – Application for access to four harmonised standards approved by the European Committee for Standardisation – Exception relating to the protection of the commercial interests of a third party – Copyright protection – Refusal to grant access – Action for annulment)

- 965203 -
In Case T-185/19,

Public.Resource.Org, Inc., established in Sebastopol, California (United States),

Right to Know CLG, established in Dublin (Ireland),

represented by F. Logue, Solicitor, and by A. Grünwald, J. Hackl and C. Nüßing, lawyers,

applicants,

v

European Commission, represented by G. Gattinara, F. Thiran and S. Delaude, acting as Agents,

defendant,

supported by

European Committee for Standardisation (CEN), established in Brussels (Belgium), and the other interveners whose names are listed in the Annex, [1] represented by U. Karpenstein, K. Dingemann and M. Kottmann, lawyers,

interveners,

* Language of the case: English.

[1] The list of the other interveners is annexed only to the version notified to the parties.

EN

APPLICATION pursuant to Article 263 TFEU for annulment of the decision of the European Commission of 22 January 2019 refusing to grant the application for access to four harmonised standards adopted by the CEN.

Facts giving rise to the dispute

1 On 25 September 2018, the applicants, Public.Resource.Org, Inc. and Right to Know CLG, lodged an application with the Directorate-General for the Internal Market, Industry, Entrepreneurship and SMEs of the European Commission, on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) and of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13), for access to documents held by the Commission ('the application for access').

2 The application for access concerned four harmonised standards adopted by the European Committee for Standardisation (CEN) pursuant to Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/24/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12), namely EN standard 71-5:2015, entitled 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets', EN standard 71-4:2013, entitled 'Safety of toys – Part 4: Experimental sets for chemistry and related activities', EN standard 71-12:2013, entitled 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances' and EN standard 12472:2005+A1:2009, entitled 'Method for the simulation of wear and corrosion for the detection of nickel release from coated items') ('the requested harmonised standards').

3 By letter of 15 November 2018, the Commission refused to grant the application for access on the basis of the first indent of Article 4(2) of Regulation No 1049/2001 ('the initial refusal decision').

4 On 30 November 2018, the applicants lodged a confirmatory application with the Commission pursuant to Article 7(2) of Regulation No 1049/2001. By decision of 22 January 2019, the Commission confirmed the refusal to grant access to the requested harmonised standards ('the confirmatory decision').

Procedure and forms of order sought by the parties

5 By application lodged at the Registry of the General Court on 28 March 2019, the applicants brought the present action.

6 By document lodged at the Court Registry on 10 July 2019, the CEN and fourteen national standards bodies, namely the Asociación Española de Normalización (UNE), the Asociaţia de Standardizare din România (ASRO), the Association française de normalisation (AFNOR), the Austrian Standards International (ASI), the British Standards Institution (BSI), the Bureau de normalisation/Bureau voor Normalisatie (NBN), the Dansk Standard (DS), the Deutsches Institut für Normung e.V. (DIN), the Koninklijk Nederlands Normalisatie Instituut (NEN), the Schweizerische Normen-Vereinigung (SNV), the Standard Norge (SN), the Suomen Standardisoimisliitto r.y. (SFS), the Svenska institutet för standarder (SIS) and the Institut za standardizaciju Srbije (ISS) applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

7 By order of 20 November 2019, *Public.Resource.Org and Right to Know* v *Commission* (T-185/19, not published, EU:T:2019:828), the President of the Fifth Chamber of the General Court granted the application for leave to intervene. The interveners lodged their statement in intervention and the main parties lodged their observations thereon within the periods prescribed.

8 By letter lodged at the Registry of the General Court on 20 March 2020, the applicants requested an oral hearing.Acting on a proposal from the Judge-Rapporteur, the General Court (Fifth Chamber) decided to open the oral phase of the proceedings.

9 By order of 17 June 2020, the General Court (Fifth Chamber), on the basis of Articles 91(c), 92(1) and 104 of its Rules of Procedure, ordered the Commission to produce the harmonised standards requested and decided that they would not be communicated to the applicants. The Commission complied with that measure of inquiry within the period prescribed.

10 On a proposal from the General Court (Fifth Chamber), the latter decided, pursuant to Article 28 of its Rules of Procedure, to refer the case to the Fifth Chamber, Extended Composition.

11 Acting on a proposal from the Judge-Rapporteur, the General Court (Fifth Chamber, Extended Composition) put written questions to the parties, by way of measures of organisation of procedure laid down in Article 89 of the Rules of Procedure, and requested that they respond before the hearing. The parties complied with that request within the period prescribed.

12 The applicants claim that the Court should:

– annul the confirmatory decision, and also the initial decision;

– in the alternative, refer the matter back to the Commission;

– order the Commission to pay the costs.

13 The Commission, supported by the CEN, the UNE, the ASRO, the AFNOR, the ASI, the BSI, the NBN, the DS, the DIN, the NEN, the SNV, the SN, the SFS, the SIS and the ISS, contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

14 The interveners contend that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Pleas in law and arguments of the parties

Admissibility

15 The interveners argue that the action is inadmissible because the applicants have no legal interest in bringing proceedings. According to the interveners, in so far as the applicants could access the requested harmonised standards free of charge through libraries, they have no interest in bringing the present proceedings.

16 The Commission, while requesting that the action be dismissed, does not dispute that the applicants have an interest in bringing proceedings.

17 The applicants merely note that, although the interveners seek to challenge the admissibility of the action on the ground that the requested harmonised standards are already accessible to the applicants free of charge through libraries, those interveners do not identify any specific library which is easily accessible to either of the applicants.

Substance

18 In support of their action, the applicants rely on two pleas in law, alleging (i) an error of law and an error of assessment in the application of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, aimed at protecting commercial interests, and (ii) an error of law and an error of assessment as regards the existence of an overriding public interest, under the last clause of Article 4(2) of that regulation.

The first plea in law, alleging errors of law and errors of assessment in the application of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, aimed at protecting commercial interests

19 By their first plea in law, the applicants dispute, in essence, the applicability of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001 to the present case, on the ground that, first, no copyright protection can be applicable to the requested harmonised standards and, secondly, no harm to the commercial interests of the CEN and its national members has been established.

20 The first plea in law is divided into three parts. The first and second parts allege errors of law and of assessment relating to the application of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001. The first part concerns an error of law relating to the existence of copyright protection for the requested harmonised standards, in so far as those standards form part of EU law. The second part concerns an error of law relating to the existence of copyright protection for those standards in the absence of 'personal intellectual creation'. The third part alleges an error of assessment as to the effect on commercial interests.

– *The first part, alleging errors of law and errors of assessment relating to the application of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, as regards the existence of copyright protection for the requested harmonised standards*

21 The applicants claim that, they have a right of access to the harmonised standards requested pursuant to Article 42 of the Charter of Fundamental Rights of the European Union, Article 15(3), first subparagraph, of the TFEU, read together with Article 2(1) of Regulation 1049/2001, and Article 3 of Regulation 1367/2006. According to the applicants, in so far as the requested harmonised standards form part of EU law, those standards should be accessible freely and without charge, so that no exception to the right of access can be applicable to them. The applicants further submit that the doctrine of copyright cannot affect the constitutional imperative flowing from the idea that the EU is founded on the basis of the rule of law that the law must be publicly accessible and freely available.

22 In support of their arguments, the applicants rely on the judgments of 27 October 2016, *James Elliott Construction*, C-613/14, EU:C:2016:821, of 26 April 1990, of the Bundesgerichtshof (Federal Court of Justice, Germany), DIN-Normen, IZR79/88, and of the 29 July 1998, of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), DE:BVerfG:1998:rk19980729.1bvr114390, and the Opinion of Advocate General Szpunar in *Funke Medien NRW*, C-469/17, EU:C:2018:870.

23 The Commission, supported by the interveners, disputes the applicants' arguments and maintains that the intellectual property in the requested harmonised standards is protected by 'national law' and that the lawfulness of that protection cannot be contested in the present proceedings. The Commission also points out that, to its knowledge, the applicants have not brought proceedings challenging the validity of the copyright protection for those standards before the national courts having jurisdiction. It adds that copyright protection is 'also contractually guaranteed to the CEN and its members' and that the requested harmonised standards are licensed for use by the Commission under restrictive conditions, with access to them being limited solely to its internal use and any external disclosure being prohibited.

– *The second part, alleging errors of law and errors of assessment relating to the application of the exception provided for in the first indent of Article 4(2) of Regulation No 1049/2001, as regards the existence of 'personal intellectual creation'*

24 According to the applicants, even if copyright protection for the requested harmonised standards was theoretically possible, it was not applicable to those standards because they do not constitute a 'personal intellectual creation', for the purposes of the case-law of the Court of Justice, which would enable them to benefit from such protection.

25 The Commission argues that, in assessing the application for access, it merely pointed out that the standards at issue were the results of a process during which a very specific technical expertise was provided, in order to establish the specifications which may be used to comply with the requirements set out by EU legislation. Such a process includes an intellectual creation of the author of the standards. That creative element is recognised by the 'applicable national law' and cannot be called into question by the Commission in the context of the examination of an application for access to documents submitted under Regulation No 1049/2001.

26 The interveners state that the requested harmonised standards, like any other harmonised standard, fulfil the requirements for classification as works eligible for copyright protection. Thus, although their content is predetermined by the essential requirements of the harmonisation legislation, by the Commission's request and by the state of the art in technology, the experts are free regarding their linguistic illustration. In order to explain technically complex issues in a comprehensible manner, a clear and precise form of expression that goes beyond the mere enumeration of technical requirements and thus gives leaves room for creative originality is required.

– *The third part, alleging an error of assessment as regards the existence of the alleged infringement of the commercial interests of the CEN and its national members*

27 The applicants argue that the Commission has not established how disclosure of the requested harmonised standards might harm the commercial interests of the CEN. They submit that, even if copyright protection for those standards was theoretically possible and even if those standards were regarded as a personal intellectual creation, the confirmatory decision should still be annulled, since the Commission has not established the alleged infringement of the commercial interests of the CEN as the author of the requested harmonised standards.

28 The Commission, supported by the interveners, disputes the applicants' arguments. It maintains that a fee must be paid in order to access the standards at issue, while their disclosure under Regulation No 1049/2001 would necessarily make them accessible free of charge. According to the Commission, in accordance with the '*erga omnes*' rule, documents disclosed under the regulation on public access are in the public domain and become accessible to the public. This would mean that, if the Commission had granted the application for access made by the applicants, it would have made the four standards available to everyone free of charge, putting at significant risk the production of further standards and the possibility of having a method showing that a product complies with the requirements established in the EU legislation by recourse to a uniform method.

The second plea in law, alleging an error of law and an error of assessment as regards the existence of an overriding public interest, under the last clause of Article 4(2) of Regulation No 1049/2001

29 The applicants complain that the Commission made an error of law and an error of assessment in considering that there was no overriding public interest, within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001, justifying disclosure of the requested harmonised standards.

30 The second plea in law is divided into three parts. The first part alleges an error of law as regards the existence of an overriding public interest, under the last clause of Article 4(2) of Regulation No 1049/2001, requiring free access to the law. The second part concerns an error of law relating to the existence of an overriding public interest due to the obligation of transparency in environmental matters. The third part alleges inadequate reasoning for the Commission's refusal to recognise the existence of an overriding public interest.

– *The first part, alleging on an error of law as regards the existence of an overriding public interest requiring free access to the law*

31 Under the first part of the second plea in law, the applicants argue, in the alternative, that, even assuming that it is possible to establish in the present case that the requested harmonised standards are covered by the substantive exception

relating to the effect on commercial interests, there was an overriding public interest in disclosure of those standards, for the purposes of the last clause of Article 4(2) of Regulation No 1049/2001, that is to say in ensuring free access to the law. More specifically, the fact that the requested harmonised standards formed part of EU law gives rise to a constitutional imperative to grant free access to them.

32 According to the applicants, in so far as the harmonised standards form part of EU law, as the Court of Justice held in its judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), there is an 'automatic overriding public interest' justifying the disclosure of those standards. The applicants rely in particular on the principle of legal certainty, which can be guaranteed only by proper publication of the law in the official language of the addressee of that law. Moreover, they refer to the case-law of the European Court of Human Rights on accessibility of the law. The applicants also highlight the link between the accessibility of standards and the proper functioning of the internal market. Finally, the applicants take the view that the principle of sound administration provided for in Article 41 of the Charter as well as the free movement of goods and the freedom to provide services guaranteed in Articles 34 and 56 TFEU require free access to the standards.

33 In any event, the applicants maintain that the confirmatory decision disregards the last clause of Article 4(2) of Regulation No 1049/2001 in so far as the Commission failed to examine the existence of a public interest in disclosure and, more generally, to weigh the interests served by disclosure with those against disclosure. In that regard, the applicants dispute the Commission's assertion that they merely put forward general considerations which could not provide an appropriate basis for establishing that the principle of transparency was especially pressing in the present case. Reliance on the particular nature of the requested harmonised standards is sufficient in the present case to justify the existence of a particular public interest in disclosure within the meaning of the last clause of Article 4(2) of Regulation No 1049/2001.

34 The Commission, supported by the interveners, contends that the first part of the second plea in law should be rejected as unfounded.

35 Supported by the interveners, the Commission maintains, on the one hand, that the applicants, in support of their application for access to the requested harmonised standards, merely relied on general assertions that the disclosure of those standards is necessary for ensuring accessibility to the law and failed to state specific grounds showing to what extent such disclosure would serve that general interest. Yet such considerations cannot provide an appropriate basis for establishing that the principle of transparency represents in a specific case an issue of particularly pressing concern which prevails over the reasons justifying the refusal to disclose the documents requested.

36 On the other hand, the Commission argues that, although the very purpose of the action is for access to be granted to all the standards, at any time and without any restrictions subject to payment, the applicants nonetheless do not challenge the system of using standardisation in support of legislation. That system is based on defining the essential requirements applicable to certain products in an EU measure published in the *Official Journal of the European Union*, followed by the drawing up by European standardisation organisations of standards containing technical specifications which may be used to comply with those requirements and the approval of those standards by the Commission, which lastly publishes references to those standards in the *Official Journal of the European Union* in accordance with the conditions laid down in Article 10(6) of Regulation No 1025/2012.

37 With regard to the alleged 'constitutional imperative to freely access' the requested harmonised standards, the interveners argue that, even if harmonised standards were indeed to be considered 'EU law in the strict sense', there would be no general obligation to make them accessible free of charge. In particular, such an obligation cannot be derived from the case-law of the Court of Justice. According to the interveners, the issue of the requirement to publish EU law should be separated from the overriding interest justifying the disclosure of a document under Regulation No 1049/2001. Even if a measure had to be published in the *Official Journal of the European Union*, such publication would not in itself confer on an individual a right of access to the documents.

– *The second part, alleging an error of law relating to the existence of an overriding public interest due to the obligation of transparency in environmental matters*

38 The applicants submit, first, that the requested harmonised standards contain environmental information resulting in an overriding public interest justifying their disclosure, in accordance with Article 5(3)(b) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1, 'the Aarhus Convention'), as implemented by Article 4(2)(a) of Regulation No 1367/2006. According to the applicants, those standards constitute legislation on or relating to the environment and must thus be freely accessible. They concern the chemical composition of certain products and are aimed at 'preserving, protecting and improving the quality of the environment' and 'protecting human health'. Therefore, the requested harmonised standards also constitute 'environmental information' within the meaning of Article 2(1)(d)(iii) of Regulation No 1367/2006.

39 Secondly, the requested harmonised standards relate to emissions into the environment and, therefore, their disclosure is in the overriding public interest, within the meaning of Article 6(1) of that regulation. According to the applicants, they are harmonised standards allowing the public to foresee the quantities and

nature of substances emitted into the environment under normal and realistic conditions of use of the relevant products and to check whether the products themselves conform to the relevant standards for release of substances into the environment and for putting products on the market.

40 The Commission, supported by the interveners, dismisses the applicants' arguments. In that regard, it states that it does not consider that the requested harmonised standards contain environmental information. It adds that, even if those standards were regarded as containing such information, there would not in any event be a sufficient link between that information and any actual or foreseeable emission into the environment. The objectives of those standards have no link, even indirectly, with an assessment of 'emissions'. The mere fact that those standards partly relate to substances and contain some information on maximum levels of chemical mixtures and substances certainly does not establish a sufficient link with actual or foreseeable emissions.

– *The third part, alleging infringement of the obligation to state reasons in respect of the Commission's refusal to recognise the existence of an overriding public interest*

41 The applicants, without pointing to any specific infringement of the provisions of EU law, submit that, first, in the confirmatory decision, the Commission failed to give adequate reasons for its rejection of the arguments put forward in the confirmatory application concerning the existence of an overriding public interest justifying access to the requested harmonised standards, for the purposes of the last clause of Article 4(2) of Regulation No 1049/2001.

42 In that regard, the applicants maintain that the Commission remained entirely silent in relation to the most decisive arguments put forward by the applicants in their confirmatory application, concerning the implications of the classification of harmonised standards as 'EU law' by the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821). More specifically, the Commission does not explain, inter alia, why their argument relating to the need for access to the law in a State governed by the rule of law should not be regarded as being in the overriding public interest within the meaning of Regulation No 1049/2001.

43 Secondly, according to the applicants, the Commission has failed to explain its reasoning relating to the balancing of the conflicting interests in the present case, for the purposes of the case-law resulting from the judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374), and, in so doing, has led them to believe that such balance was struck.

44 The Commission disputes the applicants' arguments and submits that it stated to the requisite legal standard the reasons for its denial of the existence of an overriding public interest.

45 On the one hand, the Commission states that it does not agree with the applicants' interpretation of the judgment of 27 October 2016, *James Elliott Construction* (C-613/14, EU:C:2016:821), which, in its view, in no way entails an obligation proactively to publish the content of harmonised standards. The Commission adds that, in so far as the applicants had not further explained what in their opinion were the particular circumstances of the present case justifying the existence of a public interest, as regards the specific documents at issue, but merely referred to the existence of an 'automatic' public interest stemming from that judgment, the Commission was not in a position to develop in greater detail its own reasoning. Finally, according to the Commission, it was for the applicants to demonstrate the existence of an overriding public interest.

46 On the other hand, the Commission claims that the applicants' reference to the judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374) in support of their argument was irrelevant, in so far as the Commission did not take the same view as that adopted by the Council in that case and, in the present case, properly ascertained whether there was an overriding public interest.

O. Spineanu-Matei
Judge-Rapporteur

Annex

Asociación Española de Normalización y Certificación (AENOR), established in Madrid (Spain),

Asociaţia of Standardizare din România (ASRO), established in Bucharest (Romania),

Association française de normalisation (AFNOR), established in Saint-Denis (France),

Austrian Standards International (ASI), established in Vienna (Austria),

British Standards Institution (BSI), established in London (United Kingdom),

Bureau de normalisation/Bureau voor Normalisatie (NBN), established in Brussels (Belgium),

Dansk Standard (DS), established in Copenhagen (Denmark),

Deutsches Institut für Normung e. V. (DIN), established in Berlin (Germany),

Koninklijk Nederlands Normalisatie Instituut (NEN), established in AX Delft (Netherlands),

Schweizerische Normen-Vereinigung (SNV), established in Winterthur (Switzerland),

Standard Norge (SN), established in Oslo (Norway),

Suomen Standardisoimisliitto r. y. (SFS), established in Helsinki (Finland),

Svenska institutet för standarder (SIS), established in Stockholm (Sweden),

Institut za standardizaciju Srbije (ISS), established in Belgrade (Serbia).